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Supreme Court U. S.
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No. 560

In the Supreme Court of the United States

OCTOBER TERM, 1947.

EARLE W. HILTON, PETITIONER

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONER

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I.

SUB-GROUP A-1 PLUS IS INVALID.

A. *The Validity Of Sub-Group A-1 Plus Is In Issue.*

The gist of the Government's argument under this head is that Sub-group A-1 Plus is not in issue, on grounds which may be stated as follows: (1) That the 61 veterans therein with ratings of "no efficiency" would have fallen within Sub-group A-1 if it were deemed necessary or desirable that they be given a pro-

visional efficiency rating during the one-year period; (2) that on the basis of new evidence, first offered in this Court by the avenue of the Government's brief, 60 of these veterans have since been rated "good" or better, while the 61st man has resigned from the service; and (3) that on the basis of such new evidence there are no shipfitters in retention group A-2 in the Charleston Navy Yard at the present time (Resp. Br. pp. 17-21).

It is submitted that the Government may not avoid separate determination of the validity of Sub-group A-1 Plus, independently of Sub-group A-1, by now denominating Sub-group A-1 Plus as "simply a subdivision of A-1 which also encompasses only veterans" (Resp. Br. p. 17). Sub-group A-1 Plus is the first of five sub-groups in Group A, superior to and separate from Sub-group A-1. It would have no purpose or application unless it differed from Sub-group A-1 in that it includes returning veterans (for one year) regardless of efficiency rating. Sub-group A-1 Plus is further distinguished from any other sub-group in Group A by the specification that it was "required by law". Apart from alleged statutory compulsion under Section 8 of the Selective Training and Service Act of 1940, the Commission asserts—though we deny—that discretionary or "regulatory" authority exists for granting veterans superseniority rights for one year following their return from military service, regardless of efficiency ratings. (Resp. Br. p. 51). The Government in effect asks this Court to take upon itself the discretionary authority vested in the first instance in the Civil Service Commission, to retain Group A, Subgroups 1, 2, 3 and 4 as now written if Sub-group A-1 Plus is held invalid on the ground it was not "required by law" This Court has declined to enter this province

belonging to the administrative agency in numerous cases already cited (Pet. Br. p. 28).

Apart from this, none of the Government's contentions meets the decisive fact that on its own construction of Section 12 of the Veterans' Preference Act of 1944, the 61 veterans in Sub-group A-1 Plus with ratings of "no efficiency" lacked the ratings of "good" or better needed to place them in Sub-group A-1 when petitioner was reached on the retention register and furloughed. Respondents' argument that these 61 veterans might or could have been given ratings of "good" or better at the time involves the very elements of conjecture and hypothesis that the Government complains of in petitioner's analysis. Non-veterans with ratings of "no efficiency" were placed at the bottom of the retention register (R. 32) and hence were furloughed before petitioner and others in Sub-group A-2 were reached. There is no foundation of record for different treatment of veterans with "no efficiency" unless Sub-group A-1 Plus is valid on the basis on which it was established, that is, regardless of efficiency ratings. Summary judgment was granted as of the date and on the basis of the retention register then in force. Petitioner was furloughed and denied the benefits of his permanent civil service status as a result of the regulations, upheld by the order of summary judgment in behalf of the Government below.[1]

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[1] The validity of petitioner's demotion from leadingman shipfitter to shipfitter maximum on January 7, 1946 is not involved in this discussion on Sub-group A-1 Plus, since the register for the category of leadingman shipfitter (R. 20-21) did not contain any veterans in that Sub-group. The demotion may be involved however, in ascertaining the appropriate remedy if Sub-group A-1 is held invalid.

There is no basis for the Government's argument (Br. pp. 13-14) that petitioner has shifted the ground of his argument from the

The Government's allegations of new facts, when properly presented and proved, will be relevant after remand to the District Court, within the framework of new regulations promulgated by the Commission in conformity with Section 12 of the Act as construed in the opinion of this Court. See Pet. Br. pp. 79-80; cf. *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 60, 61-62; *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 494; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 445-448 (C.C.A. 2d). In no event do the new facts alleged, even if properly before this Court, render moot the issue of Sub-group A-1 Plus independently of the validity of Sub-group A-1.

This is a suit to adjudge the invalidity of existing regulations which resulted in petitioner being furloughed, and equally important, to re-establish petitioner's status under valid regulations. *Cf. Mitchell* v. *Cohen*, this Term; *Truax* v. *Raich*, 239 U. S. 33; *Borak* v. *Biddle*, 141 F. 2d 278 (App. D. C.), *cert. den.* 323 U. S. 738; *Farley* v. *United States*, 92 F. 2d 533, 538 (App. D. C.).[2] Particularly where governmental action is involved, a prayer for declaratory judgment, like other forms of equitable relief, is addressed to judicial discretion exercised in the public interest. *Eccles* v. *Peoples Bank of Lakewood*, No. 101, this Term, decided March 15, 1948; *Great Lakes Dredge &*

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demotion to the furlough. Both are properly set forth in the complaint (R. 3-4), and the relief prayed embraces both (R. 5), as the Court may deem just and proper.

[2] The Government (Br. p. 16, note 4) correctly states that petitioner is not seeking to recover back wages in the instant suit. He would be precluded from so doing by the express limitation on the jurisdiction of the District Court. 24 Stat. 505, as amended, 28 U.S.C. Sec. 41(20).

Dock Co. v. *Huffman*, 319 U. S. 293, 297. Declaratory relief may be granted, if a "case of actual controversy" otherwise exists, "whether or not further relief is or could be prayed". 28 U. S. C. Sec. 400; *United Public Workers* v. *Mitchell*, 330 U. S. at 93. Indeed, in proper cases even discontinuance of the action complained of is no bar to appropriate judicial remedies. See *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U. S. 202; *United States* v. *Trans-Missouri Joint Traffic Freight Ass'n.*, 166 U. S. 290, 307-308; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 432 (C. C. A. 2d); *cf. United States* v. *Rock Royal Co-op Inc.*, 307 U. S. 533, 555-556; *Abie State Bank* v. *Weaver*, 282 U. S. 765, 781; *McGrain* v. *Daugherty*, 273 U. S. 135, 182; *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 47; *Standard-Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 353; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 452; *Fiswick* v. *United States*, 329 U. S. 211, 221-222; *Porter* v. *Lee*, 328 U. S. 246, 251.

Respondents put great stress on the allegations that all veterans presently in Sub-group A-1 Plus have ratings of 'good" or better; that all of those with "no efficiency" subsequently obtained ratings of "good" or better (except one man, who resigned); and that all the latter, with the passage of their statutory year since petitioner was furloughed on November 8, 1946, have entered Sub-group A-1. *Supra* p. 2. But respondents overlook that appropriate relief in this case calls for adaptation of court procedure "to a remolding of the situation as nearly as may be to what it should have been initially". See *Addison* v. *Holly Hills Fruit Products Co.*, 322 U. S. 607, 619-623. If, as we contend,

Sub-group A-1 Plus is invalid now and was invalid in November 1946, the fact that more than one year has elapsed is irrelevant to the restoration of the *status quo* as nearly as possible. It is a reflection on the adaptability of remedial procedure to suggest that in order to invalidate Subgroup A-1 Plus independently of A-1, petitioner or others similarly situated were required to engage in an unseemly race to obtain adjudication by this Court within one year after their furlough, under penalty of nullifying all their efforts. *Cf. Porter* v. *Lee*, 328 U. S. 246, 251.

All doubts as to facts and inferences must be resolved in favor of petitioner since the case arises on the granting of summary judgment (Pet. Br. p. 29). Respondents' contentions are at odds with the actualities of the situation, on several alternative views:

(i) The new facts alleged fail to show how many veterans in Sub-group A-1 are retained, and on what dates the 60 veterans with "no efficiency" obtained their ratings of "good" or better. When petitioner was furloughed, there were 57 employees in Sub-group A-1, an equal number in Sub-group A-1 Plus with ratings of "good" or better, and 61 in the latter Subgroup with ratings of "no efficiency". Since 60 of those in the category last named are now in Sub-group A-1, according to the Government, notwithstanding their relatively low seniority, there are obviously many more employees in Sub-group A-1 today than in November 1946. In fact, we are advised that there are 141 employees in the ship-fitter category in the Charleston Navy Yard at the present time. Consequently, if the *status quo* were restored as of the date when petitioner was furloughed, petitioner would have been retained then in place of a veteran with "no efficiency"; and petitioner would have remained in ~~their~~ his job to

this day,[3] notwithstanding the shrinkage in employment which has occurred.

(ii) Respondents new evidence fails to disclose that all 60 of the abovementioned category of veterans qualified for their ratings of "good" or better within the past year. If Sub-group A-1 Plus were eliminated, we should assume the likelihood that petitioner would not have been reached for furlough within the past year, if then. At worst, therefore, restoration of the *status quo* would today find petitioner still within his one-year furlough period. He would retain his employment status; remain subject to coverage of the Hatch Act;[4] maintain service credit toward retirement;[5] and be enrolled on the Navy Department waiting list for restoration to duty ahead of all new applicants, whether veterans or non-veterans (Pet. Br. pp. 22-23). Petitioner would also be entitled to be enrolled on the appropriate register established by the Civil Service Commission itself, for placement elsewhere in the Federal service, and for that purpose would have standing above all non-veterans and veterans (except wounded veterans). *Federal Personnel Manual* (1945 ed.) Z1-292, as amended by Commission action of March 27, 1948. The restoration of such furlough status would be particularly valuable in the present

[3] Restoration to work under these circumstances would entitle petitioner to other rights as of the date he was furloughed. A comparable situation in the Commission's regulations is restoration after transfer with reemployment rights. "He shall be reemployed within 30 days of his application in his former position, or in a position of like seniority, status, and pay, in such manner, to the extent consistent with law, that he does not lose any of the rights or benefits to which he would have been entitled had he not been transferred or released." § 10.111(b)(2), 12 F. R. 1290.

[4] Federal Personnel Manual (1945 ed.) C2-4.

[5] *Id.*; R5-25; *supra*, note 3; *cf.* 5 U.S.C. (Supp. V) Sec. 707.

period of rising defense preparations throughout the military establishment.

(iii) The fact that there are presently no shipfitter-veterans in Sub-group A-1 Plus with ratings below "good" does not prove that this did not occur in the period since he was furloughed, or that it will not occur in the future.[6] This probability, independently of the validity of Sub-group A-1, was a continuing cloud on petitioner's reemployment from the waiting list during his one-year furlough period (Pet. Br. pp. 22-23), and it remains to imperil his continuing reinstatement rights, without competitive examination.[7]

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[6] Although our military forces are presently composed of volunteers rather than men inducted under the Selective Training and Service Act of 1940 as amended, Section 8 of that Act remains in force with respect to members of reserve components called to active duty, and volunteers for active duty. See *Interpretative Bulletin and Legal Guide, Veterans Reemployment Rights* (U. S. Department of Labor, Jan. 1948), pp. 3-4; *Trusteed Funds Inc.* v. *Dacey*, 160 F. 2d 413 (C.C.A. 1st); *Hayes* v. *Boston & Maine R. R.*, 160 F. 2d 325 (C. C. A. 1st).

The Regulations on entrance ratings, as amended March 2, 1948, read as follows: "An entrance rating is an efficiency rating given to an employee when first assigned to a position in the agency or upon change in service, class or grade. If the employee had a prior official rating whether in the same or a different agency, he shall be given such rating as his entrance rating; except that (1) if that rating is "unsatisfactory" his entrance rating shall be "Fair", and (2) if the employee had a prior higher rating as his last rating in the same agency in a position of the same service, class and grade, such rating shall be used in place of the latest official rating. If the employee has no prior official rating, his entrance rating shall be "Good." *Federal Personnel Manual* (1945 ed.) c. E1-5.

[7] *Sec. 7.101* (a). A person having a competitive status at the time of separation from the Federal service may be reinstated subject to the following requirements:

"(1) Reinstatement must be made within one year of separation if the period of service was less than two years, within two years

(iv) Finally, even if restoration of the *status quo* did not result in petitioner being placed at least in furlough status, it would nevertheless have postponed for some time the end of his active duty or the end of his furlough period. Valuable rights to retirement service credits and perhaps other benefits would thereby be reestablished by the invalidation of Sub-group A-1 Plus.

On any of these alternative views of the factual situation, petitioner's cause is neither "hypothetical" nor "moot". The Act remains unchanged. *Cf. Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538. The Commission instituted Sub-group A-1 Plus, retains it in force, and urges this Court to sustain its validity for the future. There is nothing moot or conjectural about petitioner being out of his job, or about his controversy over Sub-group A-1 Plus which was responsible, independently of Sub-group A-1, for petitioner being displaced by others in Sub-group A-1 Plus who had no right to do so under a proper construction of applicable law.

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if the period of service was two years or more but less than three years, within three years if the period of service was three years or more but less than four years, within four years if the period of service was four years or more but less than five years, and without time limitation if the period of service was five years or more . . .

"(4) The qualifications standards of the Commission for promotion or reassignment to the position must be met.

"*Sec. 7.104* (a). The Commission hereby delegates authority to agencies to reinstate any person who meets the requirements of Sec. 7.101 . . .

"(b) The Commission may disapprove any reinstatement, or suspend or withdraw this authority whenever, after post-audit, it finds that the regulations in this part have not been followed". 12 F.R. 1287 (Feb. 25, 1947); see *Federal Personnel Manual* (1945 ed.) R4-5 *et seq.*, A6-57.

In all the circumstances, an actual controversy is presented on the validity of Sub-group A-1 Plus, and petitioner may properly urge such invalidity as an independent cause of his displacement from civil service employment and as a continuing threat to his security and status therein.

B. *It Is Immaterial That Public Rather Than Private Employment Is Here Involved.*

Respondents attempt to distinguish the *Fishgold* and *Trailmobile* cases on the ground that they involved private employment (Br. pp. 46-48). It is true that Section 8(b) of the Selective Training and Service Act of 1940 makes a distinction between public and private employment, in that restoration is mandatory on the United States Government but not necessarily mandatory on a private employer if "circumstances have so changed as to make it impossible or unreasonable to do so". This simply states the judgment of Congress that as an example to the rest of the country, the Government in no circumstances is to be free to offer excuses for non-reinstatement, but these provisions of Section 8(b) only qualify the preceding language of that Section; that is, they apply simply to the duty of *reemployment* within 90 days after the veteran is relieved from training and service. The issue here involved, however, is whether sub-section (c) of Section 8 requires or authorizes an absolute retention preference to veterans whenever a *bona fide* reduction in force takes place during the statutory period "within one year after such restoration". In a word, sub-section (b) applies to reinstatement, while Sub-section (c) applied to retention for one year after reinstatement in either public or private employment. Only

Sub-section (c) is relevant here, and petitioner's brief was therefore directed to that Sub-section. The reasoning of the *Fishgold* and *Trailmobile* cases under Subsection (c) is fully applicable to public as well as private employment, as indeed the latter opinion recognizes. 331 U. S. at 57.

C. *Sub-group A-1 Plus Was Established In the Erroneous Belief That It Was Required By Section 8 Of The Selective Training And Service Act Of 1940.*

The Government's brief extends still further the list of explanations as to whether Sub-group A-1 Plus is the product of statutory compulsion or administrative discretion. The Government continues to reiterate, in somewhat different language, that "the establishment of that category or one similar to it is probably required by law" (Resp. Br. p. 50); but argues nevertheless that following the *Fishgold* decision the Commission continued the regulation as an exercise of discretion (*Id.*, p. 51). The plain answer is that the regulations as reissued in 1947, subsequent to the *Fishgold* decision, again recites that Sub-group A-1 Plus was "required by law". See § 20.3, 12 F. R. 1291 (Feb. 25, 1927) (Pet. Br. p. 92).

The obligation of the Commission under Section 12 of the Veterans' Preference Act of 1944 to exercise its considered discretion is not complied with by the presentation of alternative arguments for the convenience of litigation. *Cf. Chenery* v. *Securities Exchange Commission*, 318 U. S. 80, 94-95; see Pet. Br. pp. 23-26.

II.

Sub-Group A-1 Is Invalid.

A. *Section 12 of the Veterans' Preference Act of 1944 Differs Significantly From And Was Intended To Supersede Pre-existing Acts and Regulations.*

The Government's argument on this issue is summed up in its statements that the Veterans' Preference Act "was intended to codify existing veteran preferences and to subtract nothing therefrom"; and that "it was not the intention of Congress to deprive veterans of any of their then existing preferences" (Resp. Br. pp. 35, 33). We have already pointed out the fallacy of this position on the basis of the overwhelming evidence in the legislative history, the language of the statute, and the Government's own contentions in related litigation in the Federal courts (Pet. Br. pp. 58-68). A significant commentary on the Government's argument is its failure even to mention, let alone recognize the force of, Section 18 of the Veterans' Preference Act of 1944, which is set forth among the "statutes involved" in the Appendix to the Government's brief (p. 59).

We have already shown that the intent of respondent Flemming's testimony before the Senate Committee on Civil Service, even if given the scope contended for the Government, does not coincide with the purport of the Commission's statement to the House Committee, nor can it be deemed to over-ride the statutory plan itself when all clauses are read together against the entire legislative background (Pet. Br. pp. 55-57, 64-68). The contention that Section 12 of the Act is a mere reaffirmation of the pre-existing executive orders and administrative regulations cited by respondents is unsound on two counts:

First, those orders and regulations were never specifically brought to the attention of Congress throughout the legislative history. Commissioner Flemming's testimony before the Senate Committee makes general reference to these regulations, but quotes only and relies upon the retention preference provision of the Act of August 23, 1912, 37 Stat. 413. Congress can hardly be deemed to have ratified a detailed plan of regulations that was never specifically before it, let alone acquiesced in.

Second, Section 12 of the Act of 1944 differs significantly from the Act of 1912 cited by Commissioner Flemming, in that "due effect" is required now by Congress to be given to length of service and tenure of employment, along with efficiency ratings and veterans' preference; the first proviso re-emphasizes length of service; and the second proviso, dealing solely with efficiency ratings, provides that preference employees with ratings of "good" or better shall be retained in preference to "all other *competing* employees." The House Committee report correctly stresses that the Act of 1912 was superseded by the Act of 1944, and Section 18 reinforces that conclusion. The Government has itself underscored this by reading tenure of employment into the second proviso of Section 12 by its Groupings A, B, etc., while repudiating the claims of veterans that their absolute preference rights under the Act of 1912, regardless of tenure, were retained intact (Pet. Br. pp. 65-66). By the same token, due effect must be given to length of service in the basic groupings under the same regulations. Granted that each factor—tenure of employment, efficiency, length of service, military preference—must be taken into account, this must be done without excluding length of

service from due consideration (Pet. Br. pp. 48-49, note 13).[8]

The picture of statutory and administrative continuity between present law and pre-existing practices, painted in the Government's brief, hardly accords with the realities of the situation prior to 1944. The earliest requirement of veterans' preference in reduction-in-force appears in the Act of August 15, 1876 (19 Stat. 169), but that Act granted preference only when the competing veteran and non-veteran were "equally qualified". *Cf. Keim* v. *United States*, 177 U. S. 290. The later Act of August 23, 1912 provided that in the event of reductions-in-force in any of the executive departments, "no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary". This absolute requirement became law as a rider on an

[8] Respondents argue (Br. p. 37) that petitioner's construction would be disadvantageous to the unmarried widows of deceased servicemen. But the preference rights granted widows "are derivative in nature. They are conferred on the widows because of the dislocation and severance from civil life which their deceased husbands suffered while performing full-time duties and in partial substitution for the loss in family earning power occasioned by their husbands' deaths." *Mitchell* v. *Cohen*, decided March 8, 1948, Nos. 130-131, this Term. The discretionary authority vested in the Commission might well justify reasonable variations from general regulations to aid such widows in obtaining or retaining Federal Government employment in appropriate categories. No such regulation has been framed or is presented here. Of course nothing in the Act gives the widow of a deceased ex-shipfitter the position which he occupied in the Yard. Her preference is embraced in an augmented rating for a position for which she must qualify, and her retention preference thereafter must be related to that class or type of work.

annual appropriation bill applicable only to the few thousand civil service workers then employed in the District of Columbia, and was adopted at a time prior to the existence of the present classification and adjective rating systems (Pet. Br. pp. 67-68). It has since been effectuated by administrative regulation granting veterans with ratings of "good" or better absolute preference over non-veterans, and as so construed, has been extended in scope beyond the District of Columbia; but a realistic view of the situation prior to the enactment of the Veterans' Preference Act shows that these "prefrences" had little force in actual practice. *Id.*, p. 60.

The Veterans' Preference Act of 1944, on the other hand, was the product of years of Congressional consideration and arose in a legislative and national context far removed from those prevailing in earlier years. It was part of a comprehensive post-war program, novel in the history of veterans legislation, to aid in the readjustment and rehabilitation of World War II veterans, and designed to reestablish them as citizens in a healthy national economy (Pet. Br. pp. 31-34). In this statute Congress took the responsibility for prescribing definitive standards instead of allowing the Commission the sweeping discretion theretofore exercised. Sub-group A-1 grants a form of veterans' absolute preference or super-seniority in reductions-in-force, in disregard of the statutory purpose that due effect be given the efficiency and length of service of non-veterans under express provision of Section 12, never theretofore included in any statute.

B. *Sub-group A-1 Was Established In The Erroneous Belief That It Was Required By Law.*

The Commission has advised the Senate Committee on Post Office and Civil Service, by letter dated April 14, 1948 (*infra*, p. 19), that it favors the Langer Bill,[9] which would prohibit regulations whereby veterants could displace non-veterans with more than ten years of service, tenure and efficiency being equal. But the responsibility to promulgate valid regulations within the scope of Section 12 of the Veterans' Preference Act as now written rests upon the Commission it-

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[9] S. 2327, 80th Cong. 2d Sess., introduced March 16, 1948, designed "to preserve the equities of permanent classified civil service employees of the United States", would amend Section 12 to read as follows:

"Sec. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: Provided further, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees with less than ten years of total service and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees with less than ten years of total service who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

self, and cannot be shifted to the Bureau of the Budget, to the Navy Department, or to Congress. If Sub-group A-1 were in fact promulgated as an exercise of discretion (Resp. Br. pp. 39-45) or is now retained on that basis (Resp. Br. Opp. p. 18), then the Commission should amend the regulations in line with the Langer bill, or with the detailed regulations suggested in our main brief (p. 48, note 13). The fact that the Commission has not done so, notwithstanding its approval of the bill, is the clearest confirmation that the Commission remains firm in the belief here (Resp. Br. pp. 35-39), as in the court below (R. 55), that Sub-group A-1 was required by the second proviso of Section 12. This is established beyond question in the Commission's latest official expression on the issue, in its letter endorsing the Langer bill.

When all is said and done, the record plainly shows that Sub-group A-1 is not the product of the Commission's considered discretion under the standards laid down in Section 12. The Commission's letter above cited stresses the very factors emphasized in our main brief to show the unreasonableness and injustice of Sub-group A-1, saying:

> "The Commission has been impressed with many cases where faithful efficient employees with many years of service have been discharged in reductions in force in order to retain less experienced employees with veteran preference whose total service does not exceed a few years. This is a matter of legislative policy and the Commission has hesitated to express contrary views. The Commission believes, however, that the maintenance of a career service on the basis of merit requires more protection to faithful efficient employees who have devoted the greater part of their lives to the Federal service. Many of these employees were deprived of

an opportunity to gain veteran preference by service in the armed forces solely because of the extreme importance of their work as civilians during the war period. As long as we emphasize the importance of civilian work as well as military service during a war period we should in fairness give some recognition to long and faithful civilian service in reductions in force. This bill would give added recognition to employees who have at least ten years of total Federal service."

While we contend that the Commission cannot divest itself of the responsibility for giving due effect to length of service under Section 12 as now written, and that Sub-group A-1 exceeds the bounds of permissible discretion already vested in the Commission, it is submitted that even before that issue is reached, Sub-group A-1 should be declared invalid and the case remanded for further proceedings, because that regulation was formulated and retained under the mistaken belief that it is required by law.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons and upon the grounds more fully set forth in our main brief, the judgment below should be reversed and the cause remanded to the District Court with direction for such further relief as this Court may deem just and proper.

CHARLES FAHY,
PHILIP LEVY,
WALTER B. WILBUR,
Attorneys for Petitioner.

April, 1948.

SUPPLEMENT

United States Civil Service Commission
Washington 25, D. C.
April 14, 1948.

Honorable William Langer, Chairman
Committee on Post Office and Civil Service
United States Senate
Dear Senator Langer:

Further reference is made to your letter of March 18, 1948, requesting a report on S. 2327, a bill "To amend the Act of June 27, 1944, Public Law 359, and to preserve the equities of permanent classified civil-service employees of the United States."

Under the present language of Section 12 of the Veterans Preference Act of 1944, an employee entitled to veteran preference whose efficiency rating is "good" or better is retained over all competing employees in a reduction in force, regardless of the length of service of such competing employees. This bill seeks to modify this requirement by providing absolute preference for employees entitled to veteran preference only over competing employees with less than ten years of total service. It would also modify the preference for employees entitled to veteran preference with efficiency ratings less than "good" in the same manner.

The Commission has been impressed with many cases where faithful efficient employees with many years of service have been discharged in reductions in force in order to retain less experienced employees with veteran preference whose total service does not exceed a few years. This is a matter of legislative policy and the Commission has hesitated to express contrary views. The Commission believes, however, that the maintenance of a career service on the basis of merit requires more protection to faithful efficient employees who have devoted the greater part of their lives to the Federal service. Many of these employees were deprived of an opportunity to gain veteran preference by service

in the armed forces solely because of the extreme importance of their work as civilians during a war period. As long as we emphasize the importance of civilian work as well as military service during a war period we should in fairness give some recognition to long and faithful civilian service in reductions in force. This bill would give added recognition to employees who have at least ten years of total Federal service.

For the reasons stated, the Commission recommends that the provisions of S. 2327 be enacted into law.

We have not been informed by the Bureau of the Budget whether or not this report is in accord with the President's program.

By direction of the Commission:

Sincerely yours,

HARRY B. MITCHELL
President